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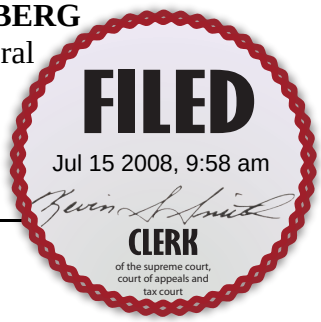

IN THE COURT OF APPEALS OF INDIANA

THOMAS LOFTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1040
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0607-MR-129638

July 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Thomas Lofton appeals his convictions and sentence for two counts of murder, a felony.[1] We affirm.

Issues

I. Was the admission of a photo array and the corresponding hearsay identification evidence fundamental error;

II. Was the evidence sufficient to sustain his convictions; and

II. Was his sentence inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History[2]

The facts most favorable to the verdict reveal the following. In the very early morning hours of July 11, 2006, Geneva Young arrived at the Frontenac apartment building in Indianapolis. She went to Anthony Merriweather's apartment on the third floor, where she sometimes stayed. They decided to get some crack cocaine, left Merriweather's apartment, and went to the elevator to go to Ronald Thornton's apartment on the fourth floor. Lofton was already in the elevator. Merriweather and Young had both known him about a year. Young noticed that Lofton had a long rifle. On the fourth floor, they all exited the elevator and went to Thornton's apartment. Young knocked on the door. Thornton opened the door, and Young and Lofton entered. Merriweather returned to his apartment.

[1] Ind. Code § 35-42-1-1.

[2] The abstract of judgment placed at the back of Lofton's appellant's brief is from a different case.

Lofton walked toward Kino Day, who was sitting on a couch, and asked him who he was. As they continued to talk, Young heard Day remark on Lofton's gun. Lofton fired a shot out the window above the couch. Young left. A few minutes later, she returned to Merriweather's apartment with some crack cocaine. They soon heard several gunshots.

At 2:08 a.m., Officer Rodney White received a dispatch that a person was shot at the Frontenac. He arrived within a minute. As he exited the elevator on the fourth floor, he saw Day lying in the hallway just outside the door to Thornton's apartment. Day told Officer White that he had been shot but that there was someone in the apartment who was in worse shape. Officer White entered Thornton's apartment and saw Thornton lying on the couch, gasping for air, and bleeding from numerous gunshot wounds. Officer White realized that he could not help him, so he returned to Day. Sergeant Steven Cheh had arrived, and Day told him that the perpetrators were two black males, one wearing a black t-shirt and one wearing a white t-shirt, who were armed with an assault rifle and a handgun. He also told the sergeant that Young had brought the shooters to the apartment. The EMTs arrived and transported Day to Methodist Hospital and Thornton to Wishard Hospital.

At about 2:30 a.m., Detective Jeffrey Wager arrived at the Frontenac to investigate the shootings. After examining the scene, he obtained Merriweather's permission to search his apartment, but found nothing. Then Detective Wager transported Young to the police station to interview her. Detective Wager created a photo array of twenty-five persons based on Young's description of the man who entered Thornton's apartment with a rifle. From this array, Young identified Lofton as that man. Based on this identification, Detective Wager created a six-photo array. The police had learned that Thornton had died, so Detective

Wager asked Detective Todd Lappin to take it to Methodist Hospital to show Day.[3] Detective Wager did not tell Detective Lappin which person was the suspect. Tr. at 191.

At Methodist, Detective Lappin located Day in the surgical care unit, where he was being "aggressively treated" by a team of medical personnel. *Id*. at 174. Day was wearing an oxygen mask, had a nasal gastric tube, and was unable to talk. Day could only make brief eye contact and nod his head. He was in "grave danger" and had a look of fear on his face. *Id*. at 174-75. Detective Lappin stood at the head of Day's bed and asked him if he could look at the photographs and indicate whether any of the persons was the shooter. Day nodded yes. Detective Lappin held the photo array in front of Day. Day pointed to Lofton's picture. Detective Lappin asked Day to sign his name under Lofton's photograph, and Day attempted to do so. Day had IV's in his arms and hands and was only able to make a mark under the photo. *Id*. at 179. About two weeks later, Day died from his injuries, namely, two gunshot wounds to his back, one of which was caused by a .380-caliber handgun, and one gunshot wound to his stomach caused by an assault rifle.

In the meantime, Detective Wager interviewed Merriweather. Merriweather identified Lofton as the person who was "around the building at the time the murder happened." *Id*. at 447.

On July 19, 2006, the State charged Lofton with Count I, murder, a felony, and Count II, attempted murder, a class A felony. On July 31, 2006, after Day's death, the State filed an amendment to add another charge of murder as Count III.

[3] The autopsy showed that Thornton had been shot eleven times by an assault rifle. Tr. at 280, 293.

On October 15, 2007, a jury trial commenced. The State offered the six-photo array with Day's mark, which was admitted without objection. *Id*. at 180. In addition, Lofton did not object to Detective Lappin's testimony regarding the photo array.

On October 16, 2007, the jury found Lofton guilty on two counts of murder. On October 25, 2007, the trial court sentenced Lofton to fifty-five years on each conviction, to run consecutively, all executed, for a total sentence of one hundred ten years. Lofton appeals.

Discussion and Decision

I. Photo Array and Identification Evidence

Lofton concedes that he failed to object to the admission of the photo array and identification evidence, which generally results in the waiver of any claim of error. *See Miles v. State*, 777 N.E.2d 767, 771 (Ind. Ct. App. 2002) ("'Failure to object at trial waives any claim of error and allows otherwise inadmissible hearsay evidence to be considered for substantive purposes and to establish a material fact at issue.'") (quoting *Johnson v. State*, 734 N.E.2d 530, 532 (Ind. 2000)). Nevertheless, he asserts that the photo array and corresponding testimony were hearsay, the admission of which constituted fundamental error.

"'In order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process.'" *Gale v. State*, 882 N.E.2d 808, 815 (Ind. Ct. App. 2008) (quoting *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002)). "The error must be so prejudicial to the defendant's rights as to make a fair trial impossible." *Id*. "Fundamental error is error so

egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial." *Gamble v. State*, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005) (quotation marks and citation omitted), *trans. denied*. "A claim of fundamental error is not viable absent a showing of grave peril and the possible effect on the jury's decision." *Dawson v. State*, 810 N.E.2d 1165, 1175 (Ind. Ct. App. 2004) (quotation marks and citation omitted), *trans. denied*.

The State argues that the photo array and identification testimony were admissible under the dying declaration exception to the hearsay rule. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. Ind. Evidence Rule 802. Hearsay is admissible under the dying declaration exception where the declarant makes a statement "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Ind. Evidence Rule 804(b)(2). "Under the dying declaration exception, the fact that a victim ultimately dies from her injuries does not make her statement admissible." *Beverly v. State*, 801 N.E.2d 1254, 1259 (Ind. Ct. App. 2004) (citing *Anderson v. State*, 471 N.E.2d 291, 292 (Ind. 1984)), *trans denied*. To be admissible,"[t]he declaration must be made by a person who knew death was imminent *and* had abandoned all hope of recovery." *Anderson*, 471 N.E.2d at 292 (citing *Dean v. State*, 432 N.E.2d 40, 45 (Ind. 1982))

(emphasis added).[4]

To determine if a declarant's statements were made with the belief death was imminent and the declarant had abandoned all hope of recovery, the trial court may consider the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound, or state of his illness. *Beverly*, 801 N.E.2d at 1260 (quotation marks and citation omitted); *see also Gipe v. State*, 165 Ind. 433, 436, 75 N.E. 881, 882 (1905) ("[I]f a dying person either declare[s] that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. That the character of the wound may of itself warrant the inference that the declarant was under a sense of certain and speedy death is settled upon the authorities[.]") (quotation marks and citation omitted). "The time between the declarant's statement and death does not normally affect its admissibility." *Thompson v. State*, 796 N.E.2d 834, 839 (Ind. Ct. App. 2003) (citing *Jones v. State*, 71 Ind. 66, 73 (1880) (written statement of victim identifying shooter was admissible even though victim died fourteen days after shooting)), *trans. denied* (2004).

Lofton likens his case to *Anderson*, 471 N.E.2d 291, in which our supreme court

[1] We observe that *Dean*, cited in *Anderson*, quoted from *Hoskins v. State*, 268 Ind. 290, 375 N.E.2d 191 (1978), wherein the court stated, "'It is true that in order for a dying declaration to be admissible it must be shown that the declarant knew that death was certain *or* that he had given up hope for recovery.'" *Id*. at 293, 375 N.E.2d at 193 (quoting *Walker v. State*, 265 Ind. 8, 10, 349 N.E.2d 161, 164 (1976)) (emphasis added); *see also Gerrick v. State*, 451 N.E.2d 327, 332 (Ind. 1983) ("A statement that would otherwise be hearsay is admissible as a dying declaration if it is shown that the declarant knew death was certain *or* had given up all hope of recovery." (emphasis added)). Thus, the *Hoskins* court used the disjunctive, whereas the *Anderson* court used the conjunctive. However, the *Anderson* court did not explicitly state that it was making a change in the standard for admissibility, which leaves us wondering whether the change was intentional. While the difference does not affect the outcome of the instant case, it could be significant in other circumstances.

concluded that the declarant's statements did *not* fall within the dying declaration exception. There, the defendant stabbed the declarant in her side and took her purse. The declarant, who eventually died from the knife wound, told eyewitnesses that two men took her purse. However, she also stated that she was all right and did not need an ambulance. Therefore, her statements were inadmissible because they were not made by a person who knew death was imminent.

Lofton claims that, like the declarant in *Anderson*, Day did not appear to believe he was dying, pointing to the fact that Officer White was not aware Day had been shot until Day told him and that Day told Officer White that he was not a priority. Appellant's Br. at 14. However, Day did not identify Lofton as the shooter when White discovered Day at the Frontenac, and therefore his argument is unavailing. Day made the identification in the surgical care unit of the hospital some hours after he had been shot. He required an oxygen mask and a nasal gastric tube. He was being aggressively treated by a team of medical personnel, was in grave danger, and had a look of fear on his face. Tr. at 174-75. As to his injuries, Day had been shot three times, twice in the back and once in the stomach. These circumstances support a reasonable inference that Day knew his death was imminent and had abandoned all hope of recovery. We conclude that the photo array and the corresponding identification testimony were admissible under the dying declaration exception to the hearsay rule, and therefore their admission did not constitute error, let alone fundamental error.

II. Sufficiency of the Evidence

Lofton challenges the sufficiency of the evidence supporting his convictions. Our standard of review is firmly established:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and draw reasonable inferences therefrom. A conviction will be upheld if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt.

Overstreet v. State, 783 N.E.2d 1140, 1152 (Ind. 2003) (citations omitted).

To establish that Lofton committed murder, the State had to prove beyond a reasonable doubt that he knowingly or intentionally killed another human being. *See* Ind. Code § 35-42-1-1. Lofton acknowledges that a murder conviction may be based wholly on circumstantial evidence, *see Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995), but claims there is insufficient evidence to support his identification as the murderer. Specifically, he asserts that there was no identification of him as the shooter other than the photo array identification. Having already determined that the photo array and the identification testimony were properly admitted under the dying declaration exception, Lofton's argument must fail. The victim identified him as the shooter, and therefore there is direct evidence of his guilt. Additionally, Young and Merriweather testified that Lofton entered Thornton's apartment with a rifle moments before the shootings. Young also saw Lofton shoot the rifle out the apartment window. In sum, we reject his contention that the evidence was insufficient to support his convictions.

III. Appropriateness of Sentence

Lofton also asserts that his one-hundred-ten-year sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is

"inappropriate in light of the nature of the offense and the character of the offender." The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The sentencing range for murder is forty-five to sixty-five years, with an advisory sentence of fifty-five years. Ind. Code § 35-50-2-3. The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Lofton does not challenge the imposition of the advisory sentence for each murder conviction but argues that consecutive sentences are inappropriate.

As to the nature of the offenses, Lofton recognizes that two people were killed. However, he contends that not enough is known regarding the circumstances of the shootings to determine whether consecutive sentences are warranted. To illustrate his point, he cites *Gleaves v. State*, 859 N.E.2d 766 (Ind. Ct. App. 2007). There, another panel of this Court upheld the defendant's consecutive sentences, noting that "Gleaves committed separate offenses against two separate victims under circumstances that permitted time for reflection without provocation between the shooting of Harris and the attempted shooting of Dudley." *Id*. at 772. According to Lofton, the evidence does not show whether the victims were shot in separate deliberative shootings or in a panicked sweep. We decline to find consecutive sentences inappropriate merely because the specific circumstances of the offenses are unknown. Moreover, even if the shootings were a panicked sweep, we fail to see how the senseless killing of two people cuts in favor of concurrent sentences.

Turning now to Lofton's character, he claims that he is young, has a limited criminal

history, and comes from a disadvantaged background.[5] These circumstances do not carry more weight than the fact that he shot and killed two people. We think that the imposition of concurrent sentences would diminish the lives of the victims. "[W]hen the perpetrator commits the same offense against two victims, enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003). Moreover, Lofton may receive the education and rehabilitation he needs through his incarceration. Therefore, we conclude that Lofton has not met his burden to persuade us that his sentence is inappropriate.

Affirmed.

BARNES, J., and BRADFORD, J., concur.

[5] He also claims that he is remorseful, but there is no evidence of that in the record other than his counsel's statement to that effect.